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IN THE

Supreme Court of the United States

October Term, 1949

No. 602

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PAN AMERICAN AIRWAYS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioners, who are the next-of-kin of Arthur Alburtus Lee, deceased, seek to have this Court review an order of the New York Court of Appeals entered on the 23rd day of November, 1949 (R. p. 152) upon the remittitur of the Appellate Division, Second Department, and the final judgment entered (R. p. 154) upon such final order and remittitur on the 12th day of December, 1949, in the office of the Clerk of the Supreme Court of the State of New York, in the County of Westchester.

Petitioners, who are plaintiffs herein, initially moved at the Special Term of the Supreme Court, Westchester County, New York, to strike out the Third and Fourth

affirmative defenses of the defendant's answer, among others, on the ground of insufficiency of law. This motion was denied by an order entered on July 14, 1947, in the office of the Clerk of Westchester County (R. pp. 43, 44). Subsequently, defendant moved for an order granting judgment on the pleadings, striking out so much of plaintiffs' claim for damages against the defendant as exceeds the sum of $8,291.87. This motion was granted by Mr. Justice FLANNERY by an order entered on December 19, 1947 (R. pp. 8, 9). Both the above orders and the judgment were unanimously affirmed by the Appellate Division, Second Department (R. pp. 81, 82; 275 App. Div. 855, Case No. 1). The remittitur of the Appellate Division and the judgment of affirmance (R. pp. 139, 140) were filed in the office of the Clerk, Westchester County, on June 2, 1949.

Then petitioners moved the Appellate Division, Second Department, for an order granting them leave to appeal to the New York Court of Appeals. Such motion was denied on the 28th day of June, 1949 (R. pp. 121, 122; 275 App. Div. 962, Case No. 2). Thereupon, petitioners applied to the New York Court of Appeals for leave to appeal to that Court, and on November 23, 1949, the New York Court of Appeals denied leave to appeal (R. p. 152; 300 N. Y. 545). Judgment was entered upon such order of the Court of Appeals and upon the aforementioned remittitur on the 12th day of December, 1949 (R. p. 154), in the office of the Clerk of Westchester County.

Opinions Below.

There were no opinions issued by the courts below. Mr. Justice J. GORDON FLANNERY in rendering his decision in the Special Term, Supreme Court, Westchester County, denying plaintiffs' motion to strike the Third and Fourth

affirmative defenses cited "*Garcia* v. *Pan American Airways*, 269 App. Div. 287, 292, aff'd 295 N. Y. 852" (R. p. 70).

The Facts and the Pleadings.

The complaint (R. pp. 51-59) alleges that the plaintiffs are the next-of-kin of Arthur Alburtus Lee, deceased, and bring the present action for the alleged wrongful death of the decedent in the accident involving defendant's aircraft Yankee Clipper near Lisbon, Portugal, on February 22, 1943. The decedent was riding as a passenger in said airplane, which was proceeding in flight across the Atlantic Ocean from New York City to an airport in Lisbon, Portugal. Decedent was killed when the airplane crashed into the Tagus River in the landing area of the airport at Lisbon.

The answer (R. pp. 60-69) denies the allegations of negligence contained in the complaint and asserts four separate and complete defenses and two separate and partial defenses. The third separate and partial defense alleges that at the time the decedent met his death he was being transported under a contract of transportation wherein the place of departure and the place of destination were within the United States and there were agreed stopping places at Lisbon, Portugal, United Kingdom of Great Britain and Northern Ireland and Natal, Brazil; that said transportation was international transportation within and subject to the Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol, signed at Warsaw October 12, 1929 (commonly known as the Warsaw Convention), said Convention having been adhered to on behalf of the United States in accordance with the proclamation of the President dated October 29, 1934 (49 Stat., pt. 2, at p. 3000), as advised by the Senate of the United States. It is further alleged that the said

transportation and the rights of the parties were and are governed by and subject tc the provisions of the said Convention, the conditions and requirements of which were in all respects duly complied with by defendant, and defendant claims limitation of liability in accordance with the provisions of Articles 17 and 24 of the Convention.

For a fourth separate and partial defense the answer recites at length the terms of the contract between the decedent and the defendant which were contained in the passenger ticket issued to the decedent for the transportation in question. It is alleged that in accordance with the said agreement the rights of the parties herein were and are governed by and subject to the rules relating to liability established by the said Warsaw Convention, the conditions and requirements of which were in all respects duly complied with by the defendant, and defendant claims limitation of liability in accordance with the rules relating to liability for death established by said Convention.

By stipulations dated September 19, 1944 and July 3, 1947, respectively (R. pp. 20-23; 48, 49), defendant admitted its liability to plaintiffs as surviving widow and next-of-kin of the decedent and that the damages in consequence thereof substantially exceeded the sum of $8,291.87. This admission of defendant, however, was made without prejudice to its contention that its liability is limited to the sum of $8,291.87 as alleged in its third and fourth partial affirmative defenses; and it was further stipulated that such admissions shall have no force and effect and shall be inadmissible for any purpose in the event that the matters alleged in the third and fourth separate partial affirmative defenses shall be stricken as insufficient in law or for any other reason.

In the aforesaid stipulations plaintiffs admitted the allegations contained in paragraphs Fifth and Sixth of de-

fendant's answer which state that on or about February 19, 1943, the decedent and the defendant entered into a contract for the transportation of said decedent by defendant and that in the course of said transportation the decedent met his death; and that said contract of transportation was evidenced by a ticket in writing which contained, among other things (R. p. 64), the following provision:

> "Transportation under the annexed Flight Coupon(s) is subject to the rules relating to liability established by the Convention of Warsaw the 12th of October 1929."

The Warsaw Convention.

The Warsaw Convention was originally signed by the representatives of twenty-three nations at Warsaw, Poland, on October 12, 1929. It is an international treaty, regulating and limiting the rights and responsibility of carriers by air in international transporation of passengers and property. The Convention, after it came into force, was left open for adherence by any State (Art. 38). The United States adhered to the Convention by proclamation of the President, dated October 29, 1934, as advised by the Senate June 15, 1934. The original text of the convention which is in French is contained in Statutes-at-Large, volume 49, Part 2, pages 3000, *et seq.* It has been ratified or adhered to by thirty-eight nations, including all or substantially all of the leading commercial nations of the world. Portugal, although not an adherent at the time of the accident, subsequently adhered to the treaty on March 20, 1947. See *United States Aviation Reports,* September and December, 1949, Treaty Data; and *A List of Treaties and Other International Acts of the United States in Force on December 31, 1941,* Department of States Publication No. 2103 (1944).

The Convention applies to all international transportation of persons, baggage, or goods performed by aircraft for hire (Art. 1). International transportation is defined in Article 1, clause (2), as:

> "any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. * * *"

The carrier is presumptively liable for death or injury to passengers (Art. 17) and for loss of or damage to property (Art. 18), but is entitled to a limitation of its liability to certain specified amounts (Art. 22). The Convention further provides (Art. 25) that the carrier shall not be entitled to the benefit of the provisions excluding or limiting liability if the damage is caused by wilful misconduct on the part of the carrier or its agents.

In recommending the adherence of this country to the Convention, Secretary of State Hull in his report to the President declared (Senate Document, Executive G, 73rd Cong. 2nd Sess.):

> "This Convention has been studied by the Department of Commerce, which advises adherence thereto by the Government of the United States. That Department has expressed the view that the provisions of the Convention are fair and afford protection to the air-transport operator as well as to passengers and shippers, and that if the United States fails to become a party to the Convention

American air-transport lines operating on an international basis will be at a disadvantage while operating in countries that are parties to the Convention."

POINT I.

The validity and constitutionality of the Warsaw Convention has been upheld by every court that has had the Convention before it and this Court has heretofore declined to review final judgments in actions for wrongful death limiting the amount of recovery under the Warsaw Convention. *Wyman* v. *Pan American Airways, Inc.*, 324 U. S. 882; *Garcia* v. *Pan American Airways, Inc.*, 338 U. S. 824.

The constitutionality of the Warsaw Convention has been sustained by every court which has had the Convention before it.

Wyman v. *Pan American Airways, Inc.*, 181 Misc. 963, 267 App. Div. 947, 293 N. Y. 878, cert. den. 324 U. S. 882;

Garcia v. *Pan American Airways, Inc.*, 269 App. Div. 287, affd. 295 N. Y. 852; cert. den. for want of a final judgment 329 U. S. 741; cert. den. finally 338 U. S. 824;

Ross v. *Pan American Airways, Inc.*, 299 N. Y. 88, 85 N. E. (2d) 880;

Indemnity Insurance Company of North America v. *Pan American Airways, Inc.*, 58 F. Supp. 338.

In the *Wyman* case above, which this Court refused to review, petitioners were the executors of a passenger en

route from San Francisco to Hong Kong on the aircraft "Hawaii Clipper", who lost his life when the aircraft disappeared in flight between Guam and Manila, P. I. The case was tried in the New York Supreme Court and following the conclusion of the trial, the Court directed judgment for the plaintiffs in the amount prescribed by the Convention, declaring (181 Misc. at pp. 964-965):

> "The rights of the parties are fixed by the rules for 'International Air Transportation' established and concluded at Warsaw, Poland, on October 12, 1929, at a convention of nearly all governments, including the United States. Final adherence to this international treaty on the part of the United States was proclaimed by the President on October 29, 1934 (49 U. S. Stat. 3000), which thus becomes part of the law of the land (U. S. Const., art. VI; *United States* v. *Belmont*, 301 U. S. 324), superseding State Law (*Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286; *Conklin* v. *Canadian-Colonial Airways*, 266 N. Y. 244). The said rules were made a condition of the ticket herein (*Murray* v. *Cunard Steamship Co. Ltd.*, 235 N. Y. 162) and in any event are so made under the rules themselves (art. 3, subd. 2).
>
> The Warsaw Convention rules are applicable only to international flights (art. 1) and raise a presumption of liability on the part of the carrier for injury or death to a passenger (arts. 17, 20) limited to 125,000 francs or approximately $8,300 under the rate of exchange fixed (art. 22) except where the carrier is guilty of 'wilful misconduct' (art. 25)."

This decision was affirmed unanimously without opinion both by the Appellate Division, First Department, 267 App. Div. 947, and the Court of Appeals, 293 N. Y. 878. This Court denied certiorari, 324 U. S. 882.

In *Garcia, et al.* v. *Pan American Airways, Inc., supra,* plaintiffs' decedent was a passenger on the Yankee Clipper

and lost his life in the same accident with which the present case is concerned. The defenses pleaded in that case were substantially identical to the third and fourth defenses here involved. The plaintiffs moved to dismiss them on the ground, *inter alia*, that the Convention is unconstitutional and argued and briefed the point at great length, both at Special Term and in the appellate courts. Mr. Justice COYNE denied the motion and expressly upheld the constitutionality of the Convention. Both the Appellate Division and the Court of Appeals unanimously affirmed, and this Court has denied certiorari. Subsequently, defendant moved for summary judgment in favor of plaintiffs and limiting plaintiffs' claim to $8,291.87. This motion was granted by the Supreme Court, Westchester County, and the Appellate Division, Second Department affirmed. The Court of Appeals denied leave to appeal and this Court denied certiorari on October 10, 1949.

The validity of the Warsaw Convention has also been upheld by a federal court in the case of *Indemnity Insurance Company of North America* v. *Pan American Airways, Inc.*, above. This latter case which also arose out of the same accident was an action in the United States District Court for the Southern District of New York. The second and third defenses in that case were again substantially identical to the third and fourth defenses in the case at bar. Plaintiff's motion to dismiss the defenses was denied in all respects by Judge RIFKIND who held (1) that the Warsaw Convention is constitutional, (2) that it is self-executing and its provisions govern the rights of parties in international air transportation as a matter of law and (3) that since the Convention is valid and operative, the defense based upon the contract of transportation incorporating the terms of the Convention is likewise sufficient in law.

These decisions not only do not conflict with each other but are fully in accord with established principles governing the application and effect of treaties to which the United States has become a party.

U. S. Constitution, Article VI, Clause 2;

Foster v. *Neilson*, 2 Peters (27 U. S.) 253, 314;

U. S. v. *Rauscher*, 119 U. S. 407, 417-418;

Dainese v. *Hale*, 91 U. S. 13, 18-19;

Asakura v. *Seattle*, 265 U. S. 332, 341;

Valentine v. *U. S. ex rel. Neidecker*, 299 U. S. 5, 10;

Bacardi Corp. v. *Domenech*, 311 U. S. 150, 161.

On page 12 of the petition, plaintiffs have set forth their arguments herein. In summary, these are:

I. The Warsaw Convention is void and unenforceable because it contravenes the Seventh Amendment of the Constitution of the United States;

II. Accordingly, the transportation contract being "infected at its core" with the unconstitutionality of the Warsaw Convention is likewise void and unenforceable;

III. The provisions of the Warsaw Convention are "fatally general, vaguely broad, ambiguous and uncertain".

As pointed out above, the courts in every case have upheld the validity and constitutionality of the Convention and in two of those cases certiorari has been denied by this Court. The plaintiffs, in arguing that the questions presented by this petition are novel and of first impression, thereby disregard the recent decisions as set forth above and the refusals of this Court to review those decisions.

If the Warsaw Convention violates the Seventh Amendment, it did so in the cases above cited, just as much as in the instant case. Petitioners indicate on page 13 of their petition that defendant's counsel conceded in oral argument before a Special Term in the Supreme Court, Westchester County, that the questions presented by defendant were novel. Actually defendant's position was and is that the questions were *not* novel and that the plaintiffs have merely advanced different arguments to attack questions already exhaustively argued by counsel and decided by the courts. The fact that appellants may be presenting a different *argument* as to unconstitutionality does not make the question a novel one or justify asking this Court to reverse its prior position. It is obvious that the question of the constitutionality and validity of the Warsaw Convention has been thoroughly considered by the courts and there is no conflict in the decisions which have unanimously upheld the Convention.

Plaintiffs' arguments that the liability and limitation provisions of the Convention are fatally general, vaguely broad, ambiguous and uncertain are also disposed of by the decisions above. Furthermore, as demonstrated under Point V of this brief, these claims are both unsupported and irrelevant.

POINT II.

The question presented by the petition is a moot one in this case as the Seventh Amendment applies (a) only to the Federal courts and (b) to suits at common law.

In addition to the decisions set forth above, plaintiffs are confronted with further difficulties. The first of these is that the Seventh Amendment has no application to State courts. This has been clearly established by a number of cases. See, for example:

Minneapolis & St. Louis R. R. Co. v. *Bombolis*, 241 U. S. 211, 220:

> "* * * the limitations of the [Seventh] Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and * * * its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States. And of course it is apparent that to apply the constitutional provision to a condition to which it is not applicable would be not to interpret and enforce the Constitution, but to distort and destroy it."

McElvaine v. *Brush*, 142 U. S. 155, 158:

> "The first ten articles of amendment were not intended to limit the powers of the States in respect of their own people, but to operate on the Federal government only; * * *."

See, also:

Justices v. *Murray*, 9 Wall. 274;

Middleton v. *Whitridge*, 213 N. Y. 499;

In re Newcomb, 18 New York Supplement 16 (not officially reported).

Thus, even if the Warsaw Convention should be held to deprive the plaintiffs of a jury trial in the State courts, its constitutionality cannot be assailed upon that ground. So far as the Federal courts are concerned, it has already been noted that the United States District Court sustained the validity of the Convention in *Indemnity Insurance Co. of North America* v. *Pan American Airways, Inc.*, 58 F. Supp. 338 (S. D. N. Y.).

Secondly, it is quite clear that the present action is not a suit at common law within the meaning of the Seventh Amendment.

The plaintiffs are endeavoring in this action to enforce a right alleged in paragraphs Tenth, Eleventh and Twelfth of the complaint (R. pp. 54-56) to arise under the statutes and laws of Portugal. Portugal is a civil and not a common law country. Their cause of action is based on and springs from the civil and not the common law.

As the New York Court of Appeals pointed out in *McConnell* v. *Caribbean Petroleum Co.*, 278 N. Y. 189, 193, where the plaintiff sued for personal injuiries sustained in Venezuela:

> "* * * Venezuela, being a civil law country, the common law, of course, is inoperative. Whatever rights plaintiff may possess depend upon article 1218 or article 1683 of the Venezuela Civil Code. Both rights are created by statute."

Plaintiffs state on page 34 of their brief that the law of Portugal, which gives rise to plaintiffs' claim for damages for the wrongful death of decedent, "is but an incidental fact in the transaction" and the rights of plaintiffs are enforced "by means of a remedy springing directly from the local common law". These statements are, of course, wholly erroneous. It has been clearly decided by the courts of New

York that no action will lie by virtue of the law of New York for a wrong committed outside of that State which resulted in death.

Whitford v. *Panama R. Co.*, 23 N. Y. 465;

Loucks v. *Standard Oil Co.*, 224 N. Y. 99;

Wikoff v. *Hirschel*, 258 N. Y. 28, 179 N. E. 249;

Baldwin v. *Powell*, 294 N. Y. 130, 161 N. E. 412; reh. den. 294 N. Y. 840, 62 N. E. (2d) 393.

See also:

Hunter v. *Derby Foods, Inc.*, 110 F. (2d) 970 (C. C. A. 2d);

Maynard v. *Eastern Airlines, Inc.*, 178 F. (2d) 139 (C. C. A. 2d).

On this point this Court, in *Baldwin* v. *Powell, supra,* said (p. 132):

> "The Decedent Estate Law [§ 130] • • • applies only to actions brought for damages for a wrong committed here causing the death of a person [citing cases]. A right of action for the death of a person which is created by another state where the wrong causing death was committed, may ordinarily be enforced in this forum even though the remedy provided in the statute creating the right of action may be different from the remedy provided in the death statute in New York."

Furthermore, no right of action has ever existed at common law to recover damages for wrongful death. No such right of action in any form existed either in England

or in this country at the time of the adoption of the Constitution. It was not until the passage in 1846 of Lord Campbell's Act that a statutory right of action for wrongful death was created in England. The right of action was first created in this country—a purely statutory cause of action—by the passage of a wrongful death statute in the State of New York in 1847.

Thus, in the *Wyman* case, *supra,* the Court said at page 965:

> "The right to bring a death action is purely statutory. It did not exist at common law (*Debevoise* v. *N. Y., L. E. & W. R.R. Co.,* 98 N. Y. 377) and depends upon the existence of a statute creating a right of action at the place where the 'force impinged' causing injuries and death (*Whitford* v. *Panama R. R. Co.,* 23 N. Y. 465; *Kristansen* v. *Steinfeldt,* 165 Misc. 575, revd. on other grounds 256 App. Div. 824)."

See also:

> *Maynard* v. *Eastern Airlines, Inc.,* 178 F. (2d) 139, 140 (C. C. A. 2d).

The Seventh Amendment merely preserves the right to jury trial where such right existed at the time the Constitution was adopted; it does not apply to remedies created subsequently. As stated in *Simmons* v. *U. S.,* 29 F. Supp. 285 (at pp. 286-287):

> "The constitutional right to a trial by jury applies to those cases in which the right existed at common law or was provided for by statute at the time the Constitution was adopted. It is not applicable to causes arising in equity or to civil cases of admiralty or maritime jurisdiction *or to remedies subsequently provided for by statute and which did not previously exist.*" (Italics ours.)

Nor is there any merit in the argument that the right of action for wrongful death has now become generally recog-

nized and, therefore, should be protected by the Seventh Amendment, notwithstanding the fact that the right of action did not exist when the amendment was adopted. In *Dimick* v. *Schiedt*, 293 U. S. 474, this Court declared (p. 487):

> "It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk* v. *United States*, 290 U. S. 371. *But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution.* The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations, 8th ed., 124." (Italics ours.)

The plaintiffs on page 34 of their brief argue that "the courts have in principle upheld the constitutional substantive right of trial by jury specifically under the Seventh Amendment in statutory actions for the recovery of damages for wrongful death" and cite *Robostelli* v. *New York, New Haven & Hartford R. Co.*, 33 F. 796, 801, and *Diederich, et al.* v. *American News Company*, 128 F. (2d) 144, 145-146. In neither of these cases was the question of the right to a jury trial at issue or decided. We know of no case which supports the appellants' contention.

Finally, the Seventh Amendment does not guarantee a jury trial in all actions at common law but only those at

common law where it existed at the time of passage of the amendment. In *United States* v. *243.22 Acres of Land,* 41 F. Supp. 805, aff'd 129 F. (2d) 678, cert. den. *Lambert* v. *U. S.,* 317 U. S. 698, 63 S. Ct. 441, the Court said (p. 806):

> "The earlier decisions apparently rest on the conclusion that since a condemnation proceeding is an action at law, it therefore falls within the orbit of the Seventh Amendment which preserves the right of trial by jury 'in suits at common law'. *The fallacy in this reasoning lies in the fact that the Seventh Amendment did not make a jury trial a matter of right in every suit at common law, but merely preserves it where it already existed.* History records no regular practice of granting jury trials in condemnation proceedings in English or early American common law (see United States v. Certain Lands in Town of Hempstead, supra), so that the mere entitling of a condemnation proceeding as an action at law is not the pass key to the area wherein lies the right to a jury trial. In fact, it might be said that if most of the earlier cases be carefully examined, few, if any, really presented the clear cut issue of the right to a jury trial." (Italics ours.)

See, also:

> *Welch* v. *T. V. A.* and *Lewis* v. *T. V. A.,* 108 F. (2d) 95, cert. den. 309 U. S. 688, 89 L. Ed. 1030, 60 S. Ct. 889.

Therefore, in view of the foregoing, it appears that plaintiffs are urging this Court to decide a purely moot question. As pointed out in the decisions above, a denial of the right of jury trial in the State courts is not a violation of the Seventh Amendment and this action is not a suit at common law within the meaning of that amendment. Consequently, the plaintiffs are by their petition asking this Court to determine whether, if this case had been brought in

the Federal instead of the State court and if it had been an action at common law instead of a statutory action for wrongful death arising under Civil Code of Portugal, the defenses founded upon the Warsaw Convention would have been invalid under the Seventh Amendment to the Constitution—obviously a purely moot question.

POINT III.

Since the decision of the Appellate Division of the New York Supreme Court may have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain the judgment, this Court should not undertake to review the decision.

As set forth in the statement herein, petitioners initially moved to strike the third and fourth affirmative defenses of the defendant's answer. The third defense pleads a limitation of liability in accordance with the provisions of the Warsaw Convention. The fourth defense pleads a limitation of liability in accordance with the terms of the contract between the decedent and the defendant.

The Supreme Court, Westchester County, denied plaintiffs' motion to strike out *both* defenses and subsequently granted defendant's motion for a verdict in favor of the plaintiffs for the limited sum and striking out so much of plaintiffs' claim as exceeded that sum. This decision was subsequently affirmed by the Appellate Division and leave to appeal was denied by the New York Court of Appeals. There were no opinions rendered by any of these courts. Therefore, it does not appear whether their decision rested upon the constitutionality of the Warsaw Convention pleaded in the third defense or upon the limitation of liability as a matter of contract under New York State law as set forth in the fourth defense.

There is, in addition, a second state ground independent of any Federal question upon which the courts of the State of New York may have rested their decision. This is that the decedent in the transportation contract waived his right to a jury trial. This point was raised by defendant and argued and briefed at length in all of the courts below.

The plaintiffs themselves recognize that the decisions of the lower courts may have been based on those purely state grounds because they argue at some length in Points II and III of their brief against the validity of the contract limitation and the existence of any waiver.

It has been well established by the decisions of this Court that if it does not appear on which of two or more grounds the State Court judgment was based, and the grounds independent of a Federal question are sufficient in themselves to sustain it, this Court will not take jurisdiction.

Klinger v. *Missouri*, 13 Wall. 257, 263;

Wood Mowing and Reaping Machine Co. v. *Skinner*, 139 U. S. 293, 297;

Allen v. *Arguimbau*, 198 U. S. 149, 154-155;

Lynch v. *New York*, 293 U. S. 52, 54-55.

See also:

Williams v. *Kaiser*, 323 U. S. 471, 477.

In stating this principle, in *Lynch* v. *New York*, *supra*, this Court said at page 54:

> "* * * The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion, 263 N. Y. 533; 189 N. E. 684, and the grounds of its decision are left to conjecture. It may be sur-

mised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Citing authorities.) *Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it,* this Court will not take jurisdiction. *Allen* v. *Arguimbau,* 198 U. S. 149, 154, 155; *Johnson* v. *Risk, supra; Wood Mowing & Reaping Machine Co.* v. *Skinner, supra; Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 596, 599; *Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 302, 304." (Italics ours.)

It is obvious here that either of the two state grounds, *i. e.,* limitation of liability by contract or waiver by contract, are substantial and sufficient in themselves to sustain the decisions of the New York State courts. As set forth on pages 4 and 5 of this brief, plaintiffs have admitted that the decedent and defendant entered into a contract for the

transportation of decedent and that said contract contained a clause limiting liability of the defendant in accordance with the terms of the Warsaw Convention. Since the courts of the State of New York refused to strike the fourth affirmative defense based on this contract, it is possible that they decided that under the law of the State of New York defendant's liability was limited in accordance with this contract.

Moreover, the New York courts may have decided that under this contract provision the decedent waived the right to a jury trial in respect to any claim in excess of the treaty limit. The Appellate Division of the Supreme Court of New York has held in at least three cases (*Zeesell Realty Co., Inc.* v. *Cunningham,* 215 App. Div. 811; *Waterside Holding Corporation* v. *Lask,* 233 App. Div. 456, and *Lera Realty Co.* v. *Rich,* 273 App. Div. 913) that a provision in a lease, waiving in advance a jury trial in the event of litigation between landlord and tenant, is valid and enforceable. We see no distinction to be drawn, in this regard, between a lease and a contract of transportation and it certainly cannot be assumed that the Appellate Division in this case did not follow its previous decisions above cited.

In this connection, it has been consistently stated that the right to trial by jury guaranteed by the Seventh Amendment may be waived by a party.

> *Barney* v. *Schneider,* 76 U. S. 248, 9 Wall. 248, 19 L. Ed. 648;
>
> *City of Richmond* v. *Smith,* 82 U. S. 429, 15 Wall. 429, 21 L. Ed. 280;
>
> *Hodges* v. *Easton,* 106 U. S. 408, 1 S. Ct. 307, 27 L. Ed. 169.

And it has been further held that the constitutional right to a trial by jury guaranteed by the Seventh Amendment is a mere privilege and may be waived by conduct inconsistent with the apparent expectation of insisting on it.

Maytag v. *Meadows Mfg. Co.*, 45 F. (2d) 299, cert. den. 283 U. S. 843, 51 S. Ct. 489, 75 L. Ed. 1952.

POINT IV.

The Warsaw Convention does not deprive the plaintiffs of their right to trial by jury.

Even assuming the correctness of plaintiffs' position that the Seventh Amendment is applicable and that the New York courts based their decision solely on the Federal question, their claims are without merit. The plaintiffs argue that because the Convention limits the liability of the defendant to $8,291.87, it fails to "preserve" their right to a trial by jury of the question as to the amount of their damages in excess of said sum.

Substantially the same argument was made against the constitutionality of the Workmen's Compensation and Federal Employers' Liability Laws. It was claimed that the Workmen's Compensation Laws deprived employers and employees of their constitutional right to a trial by jury of the question of the amount of damages suffered by employees in accidents caused by the employers' fault. This Court in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, in upholding the constitutionality of the Workmen's Compensation Law of the State of Washington, disposed of the claim of violation of the Seventh Amendment with the statement (p. 235):

> "The Seventh Amendment, with its provision for preserving the right of trial by jury, is invoked. * * *

> So far as private rights of action are preserved, * * * we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury."

See, also, *New York Central R. R. Co.* v. *White*, 243 U. S. 188, upholding the constitutionality of the Workmen's Compensation Law of New York, in which the Court said (at pp. 197-198, 201):

> "The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. *No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.* (Italics ours.)
>
> * * * * * *
>
> * * * If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary."

In like manner, under the Warsaw Convention, to paraphrase the above, if the airline passenger and his dependents are no longer able to recover as much as before in case of being injured through the carrier's negligence, they are entitled to moderate compensation in all cases of injury (Art. 17), unless the carrier affirmatively proves that all necessary measures were taken to avoid the damage or that it was impossible to take such measures (Art. 20).

In *Matter of Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514, the New York Court of Appeals, in upholding the New York Workmen's Compensation Act, said (at pp. 526-527):

> "A point was made on oral argument that the act was unconstitutional for depriving an employee injured by negligence imputable to the employer of a right of action for the wrong. * * * It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault inputable to the employer and is afforded a remedy, which is prompt, certain and inexpensive. *In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyers' fees.*" (Italics ours.)

In *Second Employers' Liability Cases*, 223 U. S. 1, the Federal Employers' Liability Act was attacked as unconstitutional because, *inter alia*, of the abrogation of the fellow-servant rule and the restriction of the defenses of contributory negligence and assumption of risk. This Court said (at p. 50):

> "Of the objection to these changes it is enough to observe:
>
> First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which

> have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' *Munn* v. *Illinois*, 94 U. S. 113, 134; *Martin* v. *Pittsburgh & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *The Lottawanna*, 21 Wall. 558, 577; *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406, 417."

In like manner, passengers of a common carrier and their dependents have "no property, no vested interest" permitting them to recover from a carrier whatever damages they may suffer in an accident. The Congress, in enacting the Employers' Liability Act, modified the right of action of railroad employees and their dependents against their employers. Similarly, in adhering to the Warsaw Convention, the United States has exercised its treaty-making power to modify the right of action of airline passengers and their dependents in international transportation. The result in both cases is that certain questions which previously were determined by jury trial are no longer so determined because the rights involving such questions no longer exist.

Many jurisdictions have by statute limited the amount of recovery in wrongful death actions leaving to the jury only the question of fixing damages within the limitation. The validity and constitutionality of these limitation provisions have been upheld and it has been further decided that these limitations will be enforced even in a State whose local statute has no limitation. *Atchison, T. & S. F. R. R. Co.* v. *Nichols*, 264 U. S. 348, 44 S. Ct. 353, 68 L. Ed. 270.

POINT V.

Plaintiffs' claims of ambiguity and uncertainty in the provisions of the Warsaw Convention are without foundation and irrelevant.

Plaintiffs argue, in Point IV of their brief, that the liability and limitation provisions of the Convention are so general, vaguely broad, ambiguous and uncertain as to render them void and unenforceable.

As demonstrated in Point I above, plaintiffs' claims in this regard are disposed of by the decisions in the *Wyman, Garcia, Indemnity Insurance Co.* and *Ross* cases, *supra,* upholding the validity of the Convention. Moreover they are both unsupported and irrelevant. For example, plaintiffs claim ambiguity as to whether the Convention applies to acts of the carrier's employees. Article 17 imposes liability without restriction for accidents occurring on board the aircraft. Article 22 limits the carrier's liability for each passenger to $8,291.87. Article 25 provides that this limitation shall not apply if the damage is caused by his wilful misconduct *or that of any of his agents acting within the scope of his employment.* Can anyone entertain a serious doubt in the face of these provisions that the Convention imposes liability upon the carrier for acts of its employees and limits such liability to the amount stated?

The only authorities which plaintiffs cite on this point are cases holding that provisions of *contracts* limiting the liability of carriers are to be construed strictly against the carrier. They cite no cases holding that a statutory or treaty limitation is to be construed in the same manner. In any event, the construction of a contract strictly against the carrier is a far cry from holding the Convention invalid and of no effect.

Conclusion.

The Petition Should Be Denied.

Respectfully submitted,

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